

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**Case No. S-2184**

**PETITION OF CHARLES R. GILBERT**

OPINION OF THE BOARD

(Hearing held July 26, 2006)

(Effective Date of Opinion: October 23, 2006)

Case No. S-2184 is an application to modify an existing special exception for an indoor rifle and pistol range to permit the retail sale of firearms at the special exception site. Condition number 2 of the Board's 1995 opinion, granting the special exception, states:

No retail sale of firearms may take place on the premises, although a potential purchaser may submit the necessary papers to begin the pre-approval process required by the State of Maryland.

The Board originally considered this modification request at its March 17, 2004 worksession. At that worksession, the Board deferred action on the modification and requested that counsel for the Petitioner, Mr. Anthony M. Shore, submit a written legal memorandum in support of the modification requested. On August 23, 2004, the Board received the memorandum, and requested advice from the County Attorney's office. The Board again considered the modification request, together with Mr. Shore's memorandum, at its worksession on November 10, 2004. At that time the Board concluded that the retail sale of firearms was neither a permitted use in the I-1 zone, nor a special exception use, nor an accessory use, issuing an opinion to that effect on February 3, 2005.

Petitioner's request that the Board reconsider this decision was denied effective May 5, 2005. On June 3, 2005, Petitioner filed a request for judicial review of the Board's Resolution to Deny Request for Reconsideration with the Circuit Court. On October 25, 2005, the Circuit Court issued an Order vacating the Board's denial of reconsideration and ordering that Case No. S-2184 be remanded to the Board "with directions to allow reconsideration with an opportunity to be provided to Petitioner to present evidence in support of the sale of firearms as an Accessory Use in the I-1 Zone." Pursuant to the Court Order, the Board held a

public hearing on July 26, 2006. Petitioner Charles Gilbert was again represented by Anthony M. Shore, Esquire.

The subject property is Lot 20, Block B, Burgundy Park Subdivision, located at 14690 Rothgeb Drive, Rockville, Maryland, in the I-1 Zone (Tax Account No. 02338520).

Decision of the Board: Special exception modification **granted**, subject to conditions.

### **EVIDENCE PRESENTED TO THE BOARD**

#### **The Board finds by a preponderance of the evidence that:**

1. The subject property, known as 14690 Rothgeb Drive, Rockville, Maryland (the "Property"), is located in the I-1 zoning district.

2. The Petitioner, Charles R. Gilbert, was granted a special exception on December 15, 1995, to operate an indoor rifle and pistol range at the subject Property. The grant was made pursuant to Section 59-G-2.50 of the Montgomery County Zoning Ordinance, Chapter 59, Montgomery County Code, 1994, as amended (the "Zoning Ordinance"), which allows "[a]n indoor, noncommercial rifle or pistol range." The proposed facility was described by the Petitioner as a state-of-the-art, members-only shooting range. The Board's decision granting the special exception notes that the Petitioner "envisioned the sale of firearms and ammunition." While the Board's decision recognized that the on-site sale of ammunition was a safety measure necessary to ensure that only certain types of ammunition were used on the premises, it expressed concern "about the proposed sale of firearms since the facility, under the [zoning] ordinance, must be 'noncommercial.'" Despite argument at the time by Mr. Shore, who is counsel for the Petitioner now and was counsel for the Petitioner at the time of the original grant, that limiting the sales of firearms and ammunition to members only satisfied the intent of the zoning ordinance that the firing range be "noncommercial," and that the sale of firearms could not be distinguished from the sale of ammunition, the Board concluded that the "sale of firearms on the premises violates the noncommercial nature which is required...." Thus, when the Board granted the special exception in 1995, it was subject to several conditions, including a restriction expressly prohibiting the "retail sale of firearms" on the premises.

3. On or about February 24, 2004, the Board received a request from the Petitioner for an administrative modification of the underlying special exception to permit the sale of firearms at the special exception site. In support of this request, Petitioner stated that at the time the special exception was granted, Petitioner sold firearms at a retail establishment separate from the special exception site, that he

had since lost his lease for that retail establishment, and that he was seeking to consolidate his businesses at the special exception site. In the petition, Petitioner made a blanket assertion that “retail sales were permitted at the special exception site under applicable zoning laws.” As noted above, the Board determined to deny Petitioner’s request and the ensuing request for reconsideration. The Circuit Court ordered the Board to reconsider this denial and to allow Petitioner to present evidence of accessory use in its Order of October 25, 2006, pursuant to which this proceeding was conducted.

4. A hearing was held on July 26, 2006. As is now the Board’s custom, Mr. Gilbert was sworn in prior to testifying; thus all of his testimony was under oath. Mr. Gilbert testified that he has been a licensed firearms dealer since 1978. He testified that he has owned the subject Property since 1991. He testified that prior to opening his indoor firing range, he had visited approximately 15 other ranges (all of which were located outside of Montgomery County), and that all of the ranges he visited had a pro shop where they sold firearms and accessories such as ammunition, holsters, ear and eye protection, and targets. He testified that his range is the only privately-owned indoor shooting range in Montgomery County.

He testified that at present, pursuant to his special exception, members of his range who wish to purchase firearms fill out the paperwork for the purchase at the range, but that the physical transfer of the firearm is done at a law office located two miles down the road from the firing range, at 416 Hungerford Drive. He testified that the law office is located in a retail zone, and that that is “where our license is located at present.”<sup>1</sup>

Mr. Gilbert testified that he had been issued a federal firearms license for the subject Property, but that he had let that license expire since he was unable to conduct retail sales at that location. He testified that if his special exception were modified to allow the sale of firearms, he would transfer the license from the retail zone location (law office) to the subject Property.<sup>2</sup> He further stated that he would need a federal firearms license to purchase guns for the range itself in order to have rentals there, guns on display, the ability to let people test firearms, and the ability to buy ammunition. He stated that certain suppliers and distributors would not sell to you if you did not have a federal firearms license.

Mr. Gilbert testified that the sales are only to persons who are members of the firing range. He estimated that the range had approximately 3,000 members annually, and stated that members must pay an annual fee to retain their member status. He testified that members are required to go through a safety orientation

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<sup>1</sup> Mr. Shore indicated that there is controlling federal law applicable to the sale of firearms, and stated that a federal firearms license is required to sell handguns anywhere in the country.

<sup>2</sup> Counsel for the Petitioner reiterated this, stating that Mr. Gilbert had two licenses, but that he had let one expire, and that if the Board were to grant the modification request, Mr. Gilbert would take the license he has for the 416 Hungerford Drive location and transfer it to the subject Property (firing range location).

class prior to shooting,<sup>3</sup> and that his range gives classes and training for individuals and police departments. He stated that there is a storage vault at the firing range where individuals and police departments can store their firearms.

He testified that in his opinion, allowing the physical transfer of the firearm to take place at the firing range would be a much safer procedure than the procedure currently in place, pursuant to which an employee of the firing range drives from the range to the law office on Hungerford Drive in order to effect the physical transfer of the firearm. He testified that a number of members leave their firearms in the storage vault at the range, and thus that if he was able to conduct the transfer at the range, some firearms would never leave the Property.

### **FINDINGS OF THE BOARD**

Based upon the testimony and the evidence of record, and as further explained below, the Board finds that the sale of firearms is an accessory use to the operation of an indoor rifle and pistol range. Because section 59-C-5.21(h) permits accessory buildings and uses in the I-1 zone, the Board concludes that Petitioner's request that his special exception be modified to allow the retail sale of firearms at the subject Property should be granted.

Section 59-C-5.21(f) of the Zoning Ordinance provides that indoor rifle or pistol ranges are permitted by special exception in the I-1 zone. Undisputed evidence of record indicates that the subject Property is located in the I-1 zone, that Petitioner was granted a special exception in 1995 to operate an indoor rifle and pistol range at the subject Property, and that the special exception as granted specifically prohibited the retail sale of firearms at the subject Property.

Pursuant to section 59-C-5.21(h) of the Zoning Ordinance, even if a use is not permitted as a matter of right or by special exception in the I-1 zone, which the retail sale of firearms is not, it may still be permitted as a use that is "accessory" to the primary use on the property. Section 59-A-2.1 of the Zoning Ordinance defines an accessory use as "a use which is (1) customarily incidental and subordinate to the principal use of a lot or the main building thereon, and (2) located on the same lot as the principal use or building."

In connection with what constitutes an "accessory use," Maryland courts have provided guidance on the meaning of the term "customarily incidental." In *County Commissioners of Carroll County v. Zent*, 86 Md. App. 745, 587 A.2d 1205 (1991), the Court of Special Appeals, perceiving a paucity of Maryland cases defining accessory uses, surveyed a number of cases from foreign jurisdictions. The Court found that "incidental" has been used to mean that an accessory use must "be reasonably related to the principal use;" "bear a close resemblance and obvious relation to the main use;" and "is dependent on or pertains to the principal

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<sup>3</sup> He stated that over 10,000 people have taken his safety orientation class.

or main use.” An accessory use is one that is “attendant and concomitant” and “is required to contribute to the comfort, convenience, or necessity of users of the principal use.” In addition, a use may be accessory if it “does not change the basic nature of the use of property.”

The term “customarily” is used to refer to a use that is “so necessary or commonly to be expected that it cannot be supposed that the ordinance was intended to prevent it.” A use that “has commonly, habitually, and by long practice been established as reasonably associated with the primary use” may be an accessory use.

For example, in Maryland the storage of trucks has been held to be accessory to a milk trucking business, *Zent, supra*, and a convenience store was found to be accessory to a gasoline service station, *Eastern Service Centers, Inc., v. Cloverland Farms Dairy, Inc.*, 130 Md.App. 1, 744 A.2d 63 (2000). Elsewhere, courts have held that off-street parking is generally considered accessory to a commercial use. An asphalt plant is accessory to a rock quarry; a restaurant is accessory to a bowling alley; and a toilet is accessory to a campground. Anderson, *American Law of Zoning*, 3<sup>rd</sup> Ed., Section 9.43 (1986).

Conversely, courts have held that a car wash is not invariably an accessory use to a gasoline service station; the sale of used cars is not accessory to an auto repair shop; and a pharmacy is not a use accessory to a physician’s office. Anderson, *id.* Whether a use is an appropriate accessory to a permitted use is decided on a case-by-case basis, and the fact that a use is an appropriate accessory use in one area does not give the user a right to establish such accessory use in an adjacent jurisdiction. *Id.*

Petitioner has testified under oath that he had visited approximately 15 other firing ranges prior to opening his firing range in order to determine the needs for his range, and that all of the ranges he visited had pro shops which sold firearms and accessories such as ammunition, holsters, ear and eye protection, and targets. Thus the Board finds, based on this undisputed testimony, that the sale of firearms at a firing range is a common occurrence, reasonably related to the principal use of firing range (at which such firearms may be discharged), and should be considered “customarily incidental” to a rifle or pistol shooting range under the *Zent* criteria.

The Board further accepts Mr. Gilbert’s testimony that currently, under his special exception grant, those members of the range who wish to purchase firearms can fill out the paperwork for the purchase at the firing range, but that once the member has been approved for the purchase, he or she must travel to a second location—416 Hungerford Drive—to take physical possession of the firearm. In light of the sworn testimony which indicates that firearms can and will only be sold to those persons who are members of the firing range, and in light of testimony that the necessary processing and paperwork related to the sale is

already taking place on site, the Board finds that the physical transfer of the firearm is subordinate to the activities already taking place on site (namely the operation of the firing range, the conduct of classes/training, and the processing of paperwork related to sales orders for firearms). The on-site physical transfer of the firearm, provided for the benefit of the membership, would be “subordinate in area, floor area, intensity, extent, and purpose” when compared with the existing special exception use, and thus also meet the description of “subordinate” provided in *Zent*. See *Zent*, 86 Md. App. at 763, 768. In addition, because sales can and will be made only to members of the range, the Board finds that they do not violate the noncommercial nature of the underlying special exception.

Having established that the evidence in the record supports a conclusion that the sale of firearms is customarily incidental and subordinate to the principal use of firing range, the remaining prong of the definition of “accessory use” requires that the use be located on the same lot as the principal use or building. Evidence of record indicates that the Petitioner is seeking permission to conduct these sales at the special exception firing range. The Board therefore concludes that the sale of firearms is an accessory use to the special exception use of indoor rifle or pistol range.

Section 59-G-1.3(c) of the Montgomery County Zoning Ordinance provides in relevant part that the Board may amend or modify the terms or conditions of a special exception on request of the special exception holder. Having found that the sale of firearms is a use accessory to the operation of an indoor rifle and pistol range, the Board hereby grants Petitioner’s requested modification to special exception S-2184, to allow Petitioner to engage in the sale of firearms at his indoor rifle and pistol range as a use accessory to the operation of that range, subject to the following conditions:

- (1) Sales can only be made to members of the special exception firing range; and
- (2) Sales must be conducted in conformance with all applicable federal, State, and local laws and regulations.

All other terms and conditions of the original special exception, together with any modifications granted by the Board of Appeals, which are not affected by this modification, remain in effect.

On a motion by Vice Chair Donna L. Baron, seconded by Member Wendell M. Holloway, with Member Caryn L. Hines, Member Angelo M. Caputo, and Allison I. Fultz, Chair, in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland, that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

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Allison Ishihara Fultz  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 23<sup>rd</sup> day of October, 2006.

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Katherine Freeman  
Executive Director

**NOTE:**

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the Zoning Ordinance). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County on accordance with the Maryland Rules of Procedure.